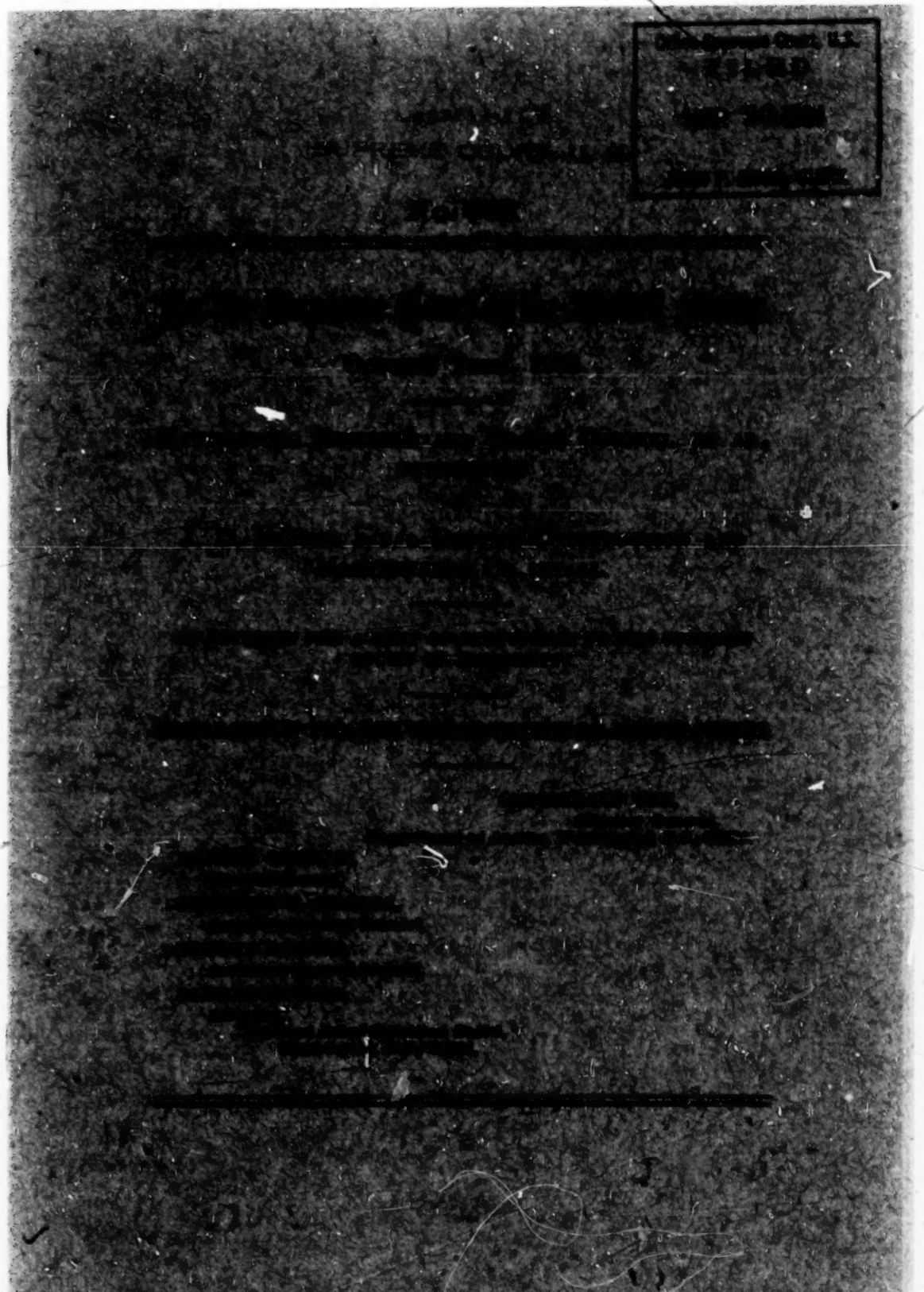

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 669

HATTIESBURG BUILDING AND TRADES COUNCIL, ET AL., PETITIONERS

v.

J. D. BROOME D/B/A BROOME CONSTRUCTION AND MAINTENANCE CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

By order of the Court, dated February 17, 1964, the Solicitor General was invited to express the views of the United States with respect to this case. The facts are stated in the petition for certiorari and in the opinion of the Supreme Court of Mississippi (Pet. 2–5, 23–31), and will be very briefly summarized here.

Petitioner is a labor organization which has been attempting to organize the employees of respondent ("Broome"), an industrial construction and maintenance firm in Hattiesburg, Mississippi (Pet. 24–25). Pontiac Eastern Corporation ("Pontiac") is engaged in the production of oil and gasoline products, and it

sells its entire production, which amounted in 1961 to more than 1.5 million barrels of refined oil and gasoline, to the Gulf Oil Corporation (R. 67, 211–212).[1]

On October 6, 1961, Broome and three other contracting firms were employed in construction and repair work at Pontiac's single refinery in Purvis, Mississippi (Pet. 23, 60). The west gate of the refinery then bore a sign reading, "Entrance for Broome Contracting and Maintenance Co. only, all others enter east gate." The east gate of the refinery bore a sign reading, "Broome Contracting and Maintenance Co. enter west gate, all others enter here" (Pet. 23). Petitioner instituted peaceful picketing at both gates to the refinery, with the pickets carrying signs which read, "J. D. Broome Const. Co., Unfair, Refuses to Bargain, No Contract, H.B.T.C., AFL–CIO" (Pet. 23). Of the 440 employees working at the refinery on October 6, 252 refused to cross the picket lines. Among these were the employees of the other contracting companies and more than half of Pontiac's employees (Pet. 23–24).

Broome and some of its employees obtained a permanent injunction from the Chancery Court of Forrest County, Mississippi, against petitioner's picketing (Pet. 22, 62–63). This injunction was issued on the following findings, *inter alia:* (1) that Broome was not engaged in activities affecting interstate commerce (Pet. 58); (2) that the purpose of the picketing was to obtain a closed-shop labor contract (Pet. 59); and (3) that such a contract would violate the right-to-work guarantee embodied in the public policy

[1] The testimony indicated that a minimum of 150,000 barrels were delivered per month.

and constitution of the State of Mississippi (Pet. 62–63). On appeal, the injunction was sustained by the Supreme Court of Mississippi (Pet. 19–56).

We believe that the decision of the Mississippi state courts is erroneous because those courts were without jurisdiction to deal with the activity involved in this case. In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244, this Court held that when "it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield." On the evidence in this case, it is reasonably clear (1) that petitioner's activity was within the jurisdiction of the National Labor Relations Board, and (2) that the Board, applying its own decisions and those of this Court, would find that petitioner had committed an unfair labor practice in violation of Section 8(b)(4)(B) of the National Labor Relations Act, as amended. Accordingly, the petition for a writ of certiorari should be granted and the judgment of the Supreme Court of Mississippi reversed on the authority of the *Garmon* case. See *McMahon* v. *Milam Mfg. Co.*, 368 U.S. 7.

1. The Board's statutory jurisdiction extends under Section 10(a) to any unfair labor practice "affecting commerce" as that term is defined in Section 2(7). However, Section 14(c)(1) of the Act, added in 1959, permits the Board to "decline to assert jurisdiction over any labor dispute * * * where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the

exercise of its jurisdiction: *Provided,* That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959." Section 14(c)(2), in turn, provides that, nothing "in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory * * * from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction."

Two principles observed by the Board are applicable to this case. First, the standard of discretionary jurisdiction applicable to an employer, other than a retail enterprise, is that the Board will take jurisdiction if the employer either (a) ships or furnishes at least $50,000 worth of goods or services outside the State or (b) supplies that volume of goods and services to another firm which is itself engaged in interstate commerce.[2] Second, where union activity alleged to involve a secondary boycott is involved, the Board's consistent practice is to take jurisdiction if the foregoing standard is satisfied either by the primary employer's activities or by the operations of the secondary employer at the site of the alleged secondary boycott, or a combination of these two.[3] The court below evidently overlooked the second principle, nor does petitioner cite it here.

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[2] *Siemons Mailing Service*, 122 NLRB 81, 85.

[3] *Truck Drivers Local Union No. 649 (Jamestown Builders Exchange)*, 93 NLRB 386; *Teamsters, Local No. 554 (McAllister Transfer, Inc.)*, 110 NLRB 1769, 1771-1772; *Madison Building and Construction Trades Council*, 134 NLRB 517; *Highway Truck Drivers and Helpers Local 107 (D.L.W.*

The record in this case does not disclose Broome's effect on interstate commerce. It does indicate, however, that Pontiac, the secondary employer on whose premises the picketing occurred, sold more than 1.5 million barrels of oil and gasoline from this one refinery to Gulf Oil Corporation in 1961 (R. 21[7]), at a time when crude oil sold for $2.89 a barrel.[4] The value of the shipments to Gulf must therefore have been worth many times the jurisdictional amount ($50,000 annually). In addition, the record shows that the Board has actually exercised jurisdiction over Pontiac in the past—an election was conducted at the refinery in 1958 (R. 68).[5] Since Gulf is well-known to be widely engaged in interstate commerce, the jurisdictional standards applicable to secondary boycotts were satisfied.

2. It is also reasonably clear that petitioner's activities violated Section 8(b)(4)(B). The standards

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Transportation Co.), 145 NLRB No. 23. The Board's practice of taking into account the business of both the primary and the secondary employers in secondary boycott cases has received judicial appproval. See *National Labor Relations Board* v. *United Construction Workers*, 198 F. 2d 391 (C.A. 4); *National Labor Relations Board* v. *Associated Musicians, Local 802*, 226 F. 2d 900, 907 (C.A. 2), certiorari denied, 351 U.S. 962; *Schauffler* v. *Brewery and Beer Distributors, Local 830*, 162 F. Supp. 1, 8–9 (E.D. Pa.).

[4] United States Bureau of the Census, *Statistical Abstract of the United States: 1963* (Eighty-fourth edition), page 726, Table 1012.

[5] The Board's file in that case reflects a stipulation concerning Pontiac's operations in which it was agreed that Pontiac had made annual purchases of more than $800,000 from out-of-state and had shipped products in interstate commerce at an annual rate of more than $5,000,000 (NLRB Case No. 15–RC–1750).

by which the Board has determined the legality of picketing at premises where the employees of an "ambulatory" employer such as Broome are engaged are set out in *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547, and have been discussed by this Court in *Local 761, Electrical Workers v. National Labor Relations Board*, 366 U.S. 667, 676–679. Under these general criteria and other applicable decisions of the Board,[6] it is established that when, as here, a separate entrance has been set aside on the common site for the use of the primary employees, picketing at other entrances constitutes secondary activity in violation of Section 8(b)(4)(B). Hence petitioner's picketing at the east gate appears to be an unfair labor practice.[7]

3. The state court's finding that it was petitioner's purpose to obtain a closed-shop labor contract and that this purpose violated Mississippi's right-to-work policy did not bring petitioner's activity within the reach of state law. This aspect of the case was fully disposed

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[6] *United Association of Journeymen, etc. (Columbia-Southern Chemical Corp.)*, 110 NLRB 206, 208; *Retail Fruit & Vegetable Clerks (Crystal Palace Market)*, 116 NLRB 856, 860–861, enforced, 249 F. 2d 591 (C.A. 9); *International Association of Machinists (Freeman Construction Co.)*, 120 NLRB 753, 761–762.

[7] It should also be noted that this case demonstrates the soundness of applying *Garmon* so as to prohibit state court action even if the conduct involved is clearly prohibited by the National Labor Relations Act. For while petitioner's picketing at the east gate amounted to a violation of Section 8(b)(4)(B), the Board, unlike the Mississippi courts, might not have ordered that *all* picketing, including that limited to the west gate, be stopped. Hence the State's assumption of jurisdiction may have prevented lawful picketing.

of by this Court's recent observation in *Retail Clerks, Local 1625* v. *Schermerhorn*, 375 U.S. 96, 105:

> * * * picketing in order to get an employer to execute an agreement to hire all-union labor in violation of a state union-security statute lies exclusively in the federal domain (*Local Union 429* v. *Farnsworth & Chambers Co.*, 353 U.S. 969, and *Local No. 438* v. *Curry*, 371 U.S. 542), because state power, recognized by § 14(b), begins *only with actual negotiation and execution of the type of agreement described by § 14(b)*. Absent such an agreement, conduct arguably an unfair labor practice would be a matter for the National Labor Relations Board under *Garmon*. [Emphasis in original.]

For the reasons stated we believe that the petition for a writ of certiorari should be granted and the judgment of the Supreme Court of Mississippi should be reversed.

Respectfully submitted.

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